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04333-0018

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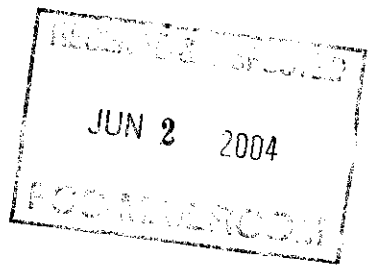
May 28, 2004



Honorable Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW - Portals II, TW-A325
Washington, DC 20554

Re: WC Docket No. 04-36

Dear Secretary:

Forwarded herewith are Comments of the Maine Public Utilities Commissioners in the above docket dealing with IP enabled services.

Should you have additional questions, you may contact Joel B. Shifman, the primary staff person dealing with this docket at (207) 287-1381.

Sincerely,

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JBS/llp
Enclosure

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Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
IP-Enabled Services	)	WC Docket No. 04-36
	)	
	)	

COMMENTS OF THE MAINE PUBLIC UTILITIES COMMISSIONERS

I. THE COMMENTING STATE COMMISSIONERS

The Maine Public Utilities Commission (Maine) is statutorily responsible for establishing just and reasonable rates, charges and practices for public utilities within its jurisdiction. It, therefore, is a "State commission" within the meaning of the Telecommunications Act of 1996.[1] The undersigned Maine Commissioners join, endorse, and file these comments.

II. INTRODUCTION

The factual and historical narrative contained in the Notice of Proposed Rulemaking makes it clear that most emerging VOIP and similar services are provided without regard to state lines or even international boundaries. Moreover, customers perceive less and less the differences between traditional circuit switched services and VOIP services; both are just convenient ways to communicate "by telephone." This development casts serious doubt on the continued relevance of dividing regulatory authority between the states and the federal government based on the jurisdictional

[1] *E.g.*, 1996 Act, Sec. 101(a), §§ 251(e), 252(b).

nature of the traffic. The time has come to develop a unitary regulatory and carrier compensation scheme that will to eliminate the increasingly arbitrary aspects of the existing dual regulatory scheme.

We agree with the Commission's preliminary finding that VOIP services are changing and evolving so rapidly that they are not well suited to the model of regulation that has been traditionally applied to circuit switched telephone services. That statement applies equally to many non-VOIP based advanced services. Market forces, coupled with vigorous enforcement of rules against deceptive practices and fraud, should eventually be sufficient to protect the public. On the other hand, the attempt to impose the prescriptions and rules developed for the monopoly circuit switched network on VOIP enabled services, many of which are commingled with and are inseverable from information services, is likely to be futile endeavor. The innovative and creative individuals who have created the internet and information services industry will likely find a way around those attempts.

III. VOIP CANNOT IN THE LONG TERM BE REGULATED DIFFERENTLY THAN OTHER SERVICES

VOIP based services and circuit switched service (plain old telephone service, or "POTS") are common applications of a wide variety of technologies that can be used to provide telephone service. Other applications include cellular wireless, other CMRS wireless services, satellite service, and integrated voice and data services. We do not believe that customers perceive these services to be any different from one another except that wireless services are portable. Customers are not aware of and do not care what technologies are used to provide these services. They are all "telephone service"

and to some degree they are substitutable for one another. As substitutability becomes more recognized and pervasive, as it must, any effort to differentiate regulatory treatment based on technology will inevitably fail. Nor would it be desirable for some technologies to prevail over others simply because of a difference in their regulatory treatment.

Because some VOIP applications merely replace existing time division multiplex circuit switched technologies with packet switching, but do not otherwise alter substantially the end-to-end network used for POTS,[2] it might be tempting to try to capture these applications under traditional regulation. Indeed, the Commission appears to have recently adopted this logic in response to the AT&T petition regarding the payment of access charges for circuit switched line services using a packet switched transport platform. (See AT&T Decision released April 21, 2004, WC Docket No. 02-361). This temptation should be resisted.

Any attempt to "fit" a VOIP application into any of the traditional regulatory classifications cannot be sustained for long. The providers of service will simply configure their service offerings to fall outside of the "silo" or "pigeonhole" that is more pervasively regulated. It does not matter whether the "silo" is technologically based (by, for example, differentiating between VOIP services that are clearly "mixed use" and those that more closely match POTS configurations) or whether it is based on a statutory classification (for example, differentiating between Title I and Title II).

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[2] This is the case, for example, where cable television CLECs use a packet topology to derive loops from existing cable plant or where traditional wireline carriers use IP based "soft switches" to replace circuit switched facilities. Those applications are no more "mixed use" than circuit switched facilities.

Furthermore, any attempt to establish special rules or protections for any specific technologies, providers, or services will distort the development of efficient networks and healthy markets.

IV. THE FCC AND THE STATES SHOULD JOINTLY DEVELOP A NEW REGULATORY SCHEME FOR ALL PROVIDERS

Rather than engage in increasingly sterile jurisdictional squabbles and increasingly pointless attempts to close the barn door when all the more clever horses have left, the FCC and the states should jointly reevaluate our overall regulatory approach for all carriers, focusing on our respective strengths and on a sober evaluation of where government *should* intervene in the market – rather than base our decisions on how we happen to have intervened or regulated in the past.

One useful initial step should be to adopt a jurisdictionally unified intercarrier compensation scheme that is technologically, competitively, and service neutral. We have identified and developed some principles for a plan that is attached to these comments as Attachment A.[3]

This rulemaking should be seen as an opportunity for both the states and the FCC to reevaluate our overall regulatory approach in a manner which better meets our regulatory objectives and is consistent with evolving technologies and markets. We do not believe the protracted controversy and litigation associated with a jurisdictional battle will serve the interests of the public. Since we do not believe the existing telephone model of regulation by the states fits an evolving industry where voice

[3] This set of principles was adopted and released by the National Association of Regulatory Utility Commissioners (NARUC) on May 5, 2004.

telecommunications is becoming merely one application (and a rather simple one) of communications and information services technology, we should develop a new regulatory model quickly. That regulatory model should be both unified jurisdictionally and unified in the sense that the policies should apply to all entities, providers and technologies.

A scheme which allows states to do what they do well, such as consumer protection, service quality and handling customer complaints, also but allows the FCC to determine national policy issues in a partnership with the states may be desirable outcome.[4] A concise description of the essential attributes of a new regulatory framework is attached to these comments as Attachment B.

V. SHORT TERM SOLUTIONS

In the near term, we believe that the FCC can exercise its jurisdiction over those service providers where the determination of jurisdiction on an end-to-end basis is very difficult, or impossible to determine.[5] The nature of the facilities that are used to provide VOIP services that are mixed, and where the interstate use is not severable from the intrastate use (such as for 'Vonage" like services), coupled with the difficulty of determining the jurisdictional nature of a communication where the location of one end of the communication is unknown, could provide a basis for a determination that the

[4] Legislation might be necessary to achieve this objective. If so, the states and the FCC should work together to develop it.

[5] We recognize that the approach could create a different regulatory scheme for some VOIP services then that for circuit switched POTS in the short term. For that reason, we recommend that the "short term" be as brief as possible. We hope that until a new joint regulatory scheme is developed, the FCC will consult with the states to the greatest extent practicable as it decides VOIP issues.

FCC has jurisdiction over those specific VOIP services. Where it takes jurisdiction, however, the FCC should move quickly to ensure that universal service, public safety (E-911) and national security (CALEA) issues are dealt with on an expedited basis. Further, the FCC should address the likelihood that the existing intercarrier compensation mechanism and ESP exemption creates a arbitrage opportunity for some VOIP providers that could disadvantage carriers required to pay access charges. Finally, we believe that inter and intrastate universal service support obligations should apply to all providers, including VOIP providers.

It is important to develop expeditiously a uniform regulatory policy that will apply to all providers, including VOIP entities. The technology or platform used to deliver all functionally equivalent "telephone services" should not dictate regulatory treatment for long. Any significant delay in achieving a rational and coherent structure will delay the innovation and investment that is needed to re-invigorate the communications market.[6]

Respectfully submitted,

Thomas L. Welch, Chairman

Sharon Reishus, Commissioner

[6] We are concerned that if "short term" is likely to be longer than a year or so, a state's ability to finance a state universal service fund could be undermined if there is a substantial customer migration from intrastate regulated POTS services to federally regulated VOIP services. For this reason we recommend that the Commission specifically allow the states to require that all entities using state telephone numbers to contribute to a state USF.

Attachment A

I. INTRODUCTION:

Portions of the current intercarrier compensation system are rapidly becoming unsustainable. There is disagreement among stakeholders over the appropriate solutions. Various industry groups have been working separately to develop intercarrier compensation proposals. The proposals are reportedly designed to replace some or all of the existing intercarrier compensation mechanisms, and are expected to be submitted to the FCC.

"Intercarrier compensation" controls how various carriers compensate one another for handling calls or for leasing dedicated circuits. "Reciprocal compensation," the fee for handling local traffic, has increasingly flowed from the Incumbent Local Exchange Carriers ("ILECs")[7] to the CLECs by virtue of such developments as CLECs terminating an increasing share of ISP traffic. "Access charges" are intercarrier fees for handling toll traffic. "Long distance" or toll compensation between carriers existed for decades under the old AT&T Bell System monopoly, and it supported a portion of the cost of common wires and facilities. Following divestiture, "access charges" were created for toll traffic.

The emergence of new communications technologies has placed stress on the current compensation system. Because it was assembled piecemeal over time, the current intercarrier compensation system has inconsistencies that can result in discriminatory practices, arbitrage or "gaming" of the current system, and other unintended outcomes.

In hopes of leading to a balanced solution, a group of the NARUC's commissioners and staff has drafted this set of guiding principles against which the various proposals can be measured and evaluated. These principles address the design and functioning of, and the prerequisites to, a new intercarrier compensation plan. They do not address the amount or appropriateness of costs recovered by particular carriers through intercarrier compensation.

II. APPLICABILITY:

A. An integrated intercarrier compensation plan should encompass rates for interconnecting CLEC and ILEC local traffic as well as access charges paid by interexchange carriers.

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[7] A "local exchange carrier" is defined generally by the Telecommunications At of 1996 as any entity engaged in the provision of telephone exchange service or exchange access. In this document, it refers to both the traditional local providers of wire-line telephone service, referenced as the Incumbent Local Exchange Carriers or ILECs, and their competitors/any competing service, referenced in this document as Competing Local Exchange Carriers or CLECs.

B. CLECs, IXCs, ISPs, VoIP, wireless, and any other companies exchanging traffic over the Public Switched Telecommunications Network should be covered ("Covered Entities").

C. No Covered Entity should be entitled to purchase a service or function at local rates as a substitute for paying intercarrier compensation.

III. ECONOMICALLY SOUND:

A. The compensation plan should minimize arbitrage opportunities and be resistant to gaming.

B. Intercarrier compensation should be designed to recover an appropriate portion of the requested carrier's[8] applicable network costs. At a minimum, this will require compliance with the jurisdictional separations and cost allocation rules, applicable case law in effect at any point in time, and 47 U.S.C. 254(k).

C. A carrier that provides a particular service or function should charge the same amount to all Covered Entities to whom the service or function is being provided. Charges should not discriminate among carriers based on:

1. the classification of the requesting carrier[9];
2. the classification of the requesting carrier's customers;
3. the location of the requesting carrier's customer;
4. the geographic location of any of the end-users who are parties to the communication; or,
5. the architecture or protocols of the requested carrier's network or equipment.

D. Intercarrier compensation charges should be competitively and technologically neutral and reflect underlying economic cost.

E. The intercarrier compensation system should encourage competition by ensuring that requested carriers have an economic incentive to interconnect, to carry the traffic, and to provide high-quality service to requesting carriers. In limited circumstances, carriers may voluntarily enter into a bill and keep arrangement.

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[8] "Requested carrier" means a carrier that receives a request for telecommunications service. An example would be a LEC that receives traffic for termination on the loop of one of the LEC's customers.

[9] "Requesting carrier" means a carrier that requests another carrier to transport, switch, or process its traffic.

[redacted]

F. Volume of use should be considered when setting intercarrier compensation rates. Available capacity may be used as a surrogate for volume of use.

G. Any intercarrier compensation system should be simple and inexpensive to administer.

IV. COMPETITIVE INTERCARRIER MARKETS NOT PRICE-REGULATED:

Market-based rates should be used where the market is determined to be competitive. A rigorous definition of "competitive market" is needed in order to prevent abuses.[10]

V. NON-COMPETITIVE INTERCARRIER MARKETS PRICE-REGULATED:

A. An intercarrier compensation system should ensure that telecommunications providers have an opportunity to earn a reasonable return and that they maintain high- quality service. It should also encourage innovation and promote development of competitive markets.

B. Government should limit the ability of carriers with market power to impose excessive charges.

C. Where charges are restricted by government action, carriers have the protections of due process, and confiscation is not permitted.

D. If any ILEC property or operations in the future could give rise to a confiscation claim, in a rate case or otherwise, then a practical way should be defined to exclude property and operations that are in competitive markets.

VI. APPROPRIATE FEDERALISM:

A. The reciprocal compensation system should ensure that revenues, cost assignment, and the risk of confiscation are jurisdictionally consistent for all classes of traffic.

B. State commissions should continue to have a significant role in establishing rates and protecting and communicating with consumers.

C. To avoid creating harmful economic incentives to de-average toll rates by some interexchange carriers, the FCC should have the authority to pool

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[10] Markets that have been competitive can become non-competitive, requiring the re-imposition of regulation to protect consumers.

[redacted]

costs within its defined jurisdiction whenever intercarrier compensation rates are high in some areas.

D. State commissions should retain a role in this process reflecting their unique insights, as well as substantial discretion in developing retail rates for services provided by providers of last resort, whether a dual or unified compensation solution is adopted.

E. A proposal preserving a significant State role that fits within the confines of existing law is preferable.

VII. UNIVERSAL SERVICE AND CONSUMER PROTECTION:

A. The transition to a new intercarrier compensation system should ensure continuity of existing services and prevent significant rate shock to end-users. Penetration rates for basic service should not be jeopardized.

B. A new intercarrier compensation system should recognize that areas served by some rural local exchange carriers are significantly more difficult to serve and have much higher costs than other areas.

C. Rural customers should continue to have rates comparable to those paid by urban customers. End-user basic local exchange rates should not be increased above just, reasonable, and affordable levels.

D. Any intercarrier compensation plan should be designed to minimize the cost impact on both federal and State universal service support programs.

VIII. ACHIEVABILITY AND DURABILITY:

A new intercarrier compensation system should not only recognize existing circumstances but should also anticipate changes at least over the intermediate term, and should provide solutions that are appropriately resilient in the face of change.

[redacted]

Attachment B

The regulatory framework must:

1. Be national in scope with one national regulatory scheme and set of regulatory requirements. Responsibility for various areas of regulatory oversight should be assigned to each jurisdiction based on principles of efficiency and in ways that reflect the fact of a national market. For example, federal jurisdiction over wholesale rules and intercarrier compensation is likely to be most effective, while state jurisdiction over service quality, slamming enforcement and customer disputes may be the best way to serve customers.

2. Be technology and provider-neutral and should not discriminate against any platform, technologies or providers. We should not favor any entity or technology through regulatory policy.

3. Include a broad-based system for providing federal and state support for high-cost areas and low-income customers. That may mean expanding the use of and collection of universal service funds beyond basic wireline service providers and redefining what is meant by "provider of last resort."

4. Provide basic standards and rules for public safety, national security and consumer protection, regardless of the provider or platform.

5. End the current intercarrier compensation system and the current separate state and federal intercarrier compensation mechanisms. They must be replaced with something more simple and rational. We must eliminate dual jurisdiction for pricing in favor of a unified pricing system. We should develop one price for all interconnection, perhaps based on the capacity of the pipe, with all else being some form of "bill and keep." Universal service support would need to be integrated into this new system in some explicit way, possibly based on the use of telephone numbers as a collection mechanism.